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In the Supreme Court of the United States

October Term, 1957

MARION B. FOLSOM, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

V.

FLORIDA CITRUS EXCHANGE, ET AL, FRANK R. SCHELL

BRIEF OF FLORIDA CITRUS EXCHANGE AND ALL OTHER RESPONDENTS, EXCEPT FRANK R. SCHELL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Florida Citrus Exchange and all other respondents except Frank R. Schell respectfully object to the issuance of writ of certiorari for the reasons set forth in detail later in this brief.

OPINIONS BELOW

The Secretary's Order (R. 281-282) appears in 20 F. R. 8493. The opinions in the Court of Appeals, printed in the Petitioner's Appendix, pp. 25-52, are reported in 246 F.2d 850. There were two cases in the Fifth Circuit, one - Florida Citrus Exchange et al vs. Marion B. Folsom, Secretary of Health, Education and Welfare, and the other - Frank R. Schell vs. Marion B. Folsom, Secretary of Health, Education and Welfare. The argument on the two cases was combined and there was one opinion but two orders, the orders appearing on page 54 of Petitioner's Appendix.

JURISDICTION

The Petitioner invokes the jurisdiction of the Court under the provisions of 28 U. S. C. 1254 (1) and 21 U. S. C. 371 (f) (4). These citations are correct. The Respondents, however, take the position that there is no conflict with the decisions of the two Courts of Appeal and that the Circuit Court of Appeals has not decided the question in a way in conflict with the applicable decisions of the Honorable Supreme Court of the United States and that there is no justification for the review on certiorari of the decisions of the Court of Appeals of the Fifth Circuit.

QUESTIONS PRESENTED

We feel that the questions as set forth on page 2 of the Petition fail to take cognizance of the fact that the questions before the Court to determine were based upon the consideration of the fact that the color was harmless in the manner and quantity as used, and that Section 406(a) also uses the words "or cannot be avoided by good manufacturing practice." With reference to question 4, the question as stated fails to take into consideration the fact that in the opinion of the Court wide discretion was still allowed in the Secretary to determine the tolerances and to make further investigation and conduct hearings. (See the concluding part of the opinion, appearing on page 48 of the Petition)

We submit our view that the questions to be decided on the review could be simply stated as follows:

1. Did the Court of Appeals for the Fifth Circuit commit error in holding that the word "harmless" must be construed in a relative sense and not in an absolute sense and in holding that the Secretary erred in taking FD&C Red No. 32 off of the certified list for use in coloring oranges not for processing and

meeting the proper maturity standards where there is no showing of likelihood of injury to human beings at the ordinary, normal levels of use?

2. Did the Court of Appeals for the Fifth Circuit err when it held that the Secretary has power to certify for a limited use and/or to provide a tolerance and that he erred in entering the order when he construed the Federal Food, Drug and Cosmetic Act as not giving him such powers?

The Court in its opinion appearing on pages 36 and 37 of the Petition states the question as follows:

> "The decision we are to make is whether the Secretary of Health, Education and Welfare is required or permitted to determine if there is a minimum quantity of the coal-tar color designated as FD&C Red No. 32 which can be used in adding color to the skins of mature oranges without danger of imparing the health of those who consume such oranges; and if so required or permitted, and if it be determined that there is such minimum, should the Secretary list and certify such color for such use."

STATUTE INVOLVED

In addition to the portion of the statute set forth in the Petition we set forth herein Section 402(c) as it appears in the Federal Food, Drug and Cosmetics Act at the time of the Secretary's order:

> "Sec. 402(c) If it bears or contains a coal-tar color other than one from a batch that has been certified in accordance with regulations as provided by section 346 of this title: PROVIDED, That this paragraph shall not apply to citrus fruit bearing or containing a coal-tar color if application for listing of such color has been made under this chapter and such application has not been acted on by the Secretary if such color was commonly used prior to the enactment

of this chapter for the purpose of coloring citrus fruit;"

The Act was amended by the passage of Public Law 672, 84th Congress, 2nd Session, taking effect July 9, 1956, by adding at the end of Section 402(c) the following as a part thereof:

"PROVIDED FURTHER, That this paragraph shall not apply to oranges meeting minimum maturity standards established by or under the laws of the States in which the oranges were grown and not intended for processing (other than oranges designated by the trade as 'packing house elimination'), the skins of which have been colored at any time prior to March 1, 1959, with the coal-tar color certified prior to the enactment of this proviso as F.D.&C. Red 32, or certified after such enactment as External D.&C. Red 14 in accordance with section 21, Code of Federal Regulations, part 9; AND PROVIDED FURTHER, That the preceding proviso shall have no further effect if prior to March 1, 1959, another coal-tar color suitable for coloring oranges is listed under section 346 of this title." (21 U.S.C. 342).

STATEMENT

The Secretary of Health, Education and Welfare had hearings and issued an order under date of November 10, 1955 removing coal-tar color F.D.&C. Orange No. 1, Orange No. 2 and Red No. 32 from the approved list of harmless colors for the unrestricted use in food, drugs and cosmetics (R. 281). The Certified Color Industry Committee took an appeal to the Second Circuit as to the entire order and the Second Circuit refused to reverse the Secretary. Its opinion appears in 263 Fed. 2d 966.

The Florida Citrus Exchange and a number of growers and packers in the State of Florida and in

the State of Texas took an appeal to the Court of Appeals of the Fifth Circuit in so far as the order affected the use of F.D.&C. Red No. 32 as used in the coloring of mature oranges meeting certain other specifications. Frank Schell also took the review proceedings to the Fifth Circuit. The Fifth Circuit rendered the decision which Petitioner is seeking to review by certiorari. These two cases were briefed separately but argued together and one opinion rendered. This opinion appears on pages 25 et sequor in the Appendix to the Petition. Petition for rehearing en banc was filed by the Secretary (Respondent in the Court below) and denied.

Matters pertinent thereto are as follows:

1. Red 32 was placed on the approved list in 1939 after a public hearing at which its harmlessness was established. The color which was certified as Red 32 had been used for the coloring of oranges prior to the passage of the Federal Food, Drug and Cosmetic Act in 1938. While the Department of Health, Education and Welfare did initiate new studies yet the tests and studies were not to determine whether the color was harmful at the levels as actually used under normal conditions of use and the tests were not made at levels of ordinary conditions of use and the amounts of the color fed to test animals were far in excess of that used in the coloring of oranges (JApp. 25-26, R. 172) and the Secretary found the evidence inadequate to support the findings as to the amount of color likely to be ingested by man from his foods, drugs and cosmetics (R. 282, Finding 10). The amount of dye in parts per million in the coloring of oranges is shown as Exhibit 8 (JApp. 94) and an analysis of this testimony appears on pages 2, 3, 4, 5, 6 and 7 of the Joint Appendix. At the levels fed a man would have to eat from 2250 oranges to 45000 oranges per day (JApp.

204) before he would get enough of the color to show ill effects from the color and could drink 5000 gallons of juice without any ill effects attributable to the color. Nothing new was developed in these hearings that was not known at the time the color was certified in 1939.

Reference is made to possible carcinogenicity as causing investigation. The Commissioner of U. S. Foods & Drug Administration now states no evidence to that effect and action has been misinterpreted.

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The orange is one of the very few fruits which has blossoms, small fruit and fully mature fruit on the tree at the same time; in the Fall until the cool days come a fully ripe and mature fruit may be green on the outside, when cool weather comes the late variety of orange may have a rich color on the outside and not be fully mature inside. Later in the Spring when the chlorophyll (green color) rises in the tree it goes into the leaves and new fruit and likewise goes into the mature and ripe fruit "regreening it," causing it to be green on the outside although it is fully mature and by reason of this it is impossible to sell unless it is colored. Only oranges meeting high standards of maturity may be colored. The use of color does not involve any element of deception as the oranges are marked "color added." Section 402 of the Act specifically prohibits the use of any color to conceal damage or inferiority in a food product F.D.&C. Red No. 32 was the only color used in coloring oranges and was being sold for such purpose only. (Joint Appendix, p. 47) The coloring of mature oranges has long been recognized by the Industry, the Department of Agriculture and the Congress as a

necessary trade practice and an economic necessity, as will be shown with detailed citations in a subsequent section of this brief. The taking of the colors off of the approved list was not because of any harm or claimed harm as used in the coloring of oranges, the Secretary stating:

> "While the scientific evidence so far available does not establish what the lowest safe dosage would be to test animals, neither does it establish a likelihood of injury to man from the use of this color on the exterior of oranges at the levels of use involved.
>
> " . . .
>
> "The evidence so far available does not establish a likelihood of injury to man from the minute amount likely to find its way into the human diet from the consumption of such colored oranges at the level of use involved." (Report of Secretary of Health, Education and Welfare, February 13, 1956—House Hearings on HR 7732, 84th Congress 2d Sess., p. 3).

3. The Petitions to reopen, referred to in paragraph 3, page 8 of the Petition for Certiorari, were overruled on the assumption by the Secretary that he had no right to continue the certification of colors if they were harmful if fed at high levels to test animals, even though the colors were not harmful when used in normal use in limited quantities, and that he had no authority to limit for particular use or to limit the quantities used. It is our position that it was this erroneous construction of the law by the Secretary which caused the order to be entered. There was no testimony in the record as to the amount used in other foods but there was evidence in the record as to the minute quantities used in the coloring of oranges (Exhibit 8, App. 94).

4. The two cases in the Fifth Circuit were consolidated and argued together and the opinion and judg-

ment are set forth in the Petition for Writ of Certiorari. The effect of the decision was that the Secretary should construe the word "harmless," taking into consideration the manner of use and quantity of color and that he had a right to establish tolerances or to certify for limited use. It still leaves the Secretary with wide discretion as to the necessity of the use and the determination of what is safe and harmless as used. (Pet. 47-48)

The decision protects both the public and the Secretary and provides that a determination may be made by the Secretary on his own initiative or upon the petition of any interested parties as to whether coloring is required and, if so, as to whether Red 32 is a harmless coal-tar color for use in coloring oranges and to fix the tolerances, if any, as may be proper for such use. (Pet. top of 47)

5. The introduction of H. R. 7732 was after the Secretary's tentative order had been entered, but before the decision of the Fifth Circuit, and before the Fifth Circuit had granted a stay, but was not passed until after the Secretary's final order. The coloring of oranges was an economic necessity and had long been encouraged by the Department of Agriculture and, not knowing whether the Fifth Circuit would grant a stay, efforts were made through this legislation to continue the use, but as will hereinafter be shown in the argument, it was not intended to limit its use in the event the Court found under the Act that certification could be continued. The words "less toxic" in line 8 of paragraph 5, page 10 of the Secretary's Petition are his conclusion and are not in the bill itself. The hearings show that the report of the Department had not come in until the day the hearings began, and, when informed of the statement of the Department, the proponents of the legislation

agreed to the amendment. The bill, as introduced, appears on page 1 of the hearings before the House Committee and uses the words "more acceptable on the basis of standards set up by the Secretary," etc. (Hearings, House Committee on Interstate and Foreign Commerce on H. R. 7732, 84th Congress, 2d Sess, pp 2-3) This legislation allowed the use of F.D.&C. Red No. 32 for the coloring of oranges meeting certain standards until March 1, 1959, unless prior thereto another coal-tar color suitable for coloring oranges is listed under Section 406. It is made clear that the use could be continued for such purposes if the Court so determined. The Senate Report concludes with the following words:

> "Inasmuch as the judicial proceedings referred to the above have not as yet been concluded, the committee wants to make it clear that if it is finally judicially determined that the Secretary of the Department of Health, Education, and Welfare already has the power to certify F.D.&C. Red No. 32 for use on the exterior of oranges, the instant legislation is not intended to limit or modify that power."
>
> S. Rep. 2391, 84th Congress, 2d Sess., p-3

The primary purpose was to grant a stay for at least three years. Of course, if the Court determined that under the construction of the Act it could certify then the Congress made it clear in its report that it did not intend to limit the Court's decision.

SUMMARY OF ARGUMENT

Answer to Petitioner's Reason for Granting the Writ of Certiorari. The Fifth Circuit case and the Second Circuit case each distinguish the two cases and are not basically in conflict, and the Fifth Circuit case is not contrary to any decision of the Supreme Court of the United States and is correct.

I. There is no basic conflict between the decisions of the Second Circuit and the Fifth Circuit and no need for resolution of any conflict.

II. The decision of the Fifth Circuit is not demonstrably incorrect but is correct and is in accordance with the decisions of the Supreme Court of the United States, the intent of Congress, as shown by the legislative history, the previous administrative determinations and recognized rules for construction of statutes.

ARGUMENT

ANSWER TO PETITIONER'S REASON FOR GRANTING THE WRIT OF CERTIORARI. THE FIFTH CIRCUIT CASE AND THE SECOND CIRCUIT CASE EACH DISTINGUISH THE TWO CASES AND ARE NOT BASICALLY IN CONFLICT, AND THE FIFTH CIRCUIT CASE IS NOT CONTRARY TO ANY DECISION OF THE SUPREME COURT OF THE UNITED STATES AND IS CORRECT.

The Secretary did by his order bar the use of this color and the two other colors from all foods, but he did this on what we claim is the erroneous assumption that he must construe the word "harmless" in an absolute manner, and that he had no right to certify for a particular use and that he had no right to fix tolerances for coal-tar colors.

It will be noted that that portion of 402(c) quoted by Petitioner on page 12 of his petition referred to certification in accordance with regulations as provided by 406 and not just 406(a). Public Law 672, referred to both in the Petitioner's brief and in this brief and shown in Petitioner's brief in note on pages 11 and 12, also refers to Section 406 and not 406(a). We feel that this has a part in showing that it was intended that coal-tar colors should be subject to tol-

erances, that 402 and 406(a) should be construed together and that all of Section 406 and both subsections (a) and (b) should be construed together. This will be developed more in detail in the subsequent argument. The statute, as referred to on page 13 of Petitioner's brief, uses the words "where such substance is required in the production thereof or can not be avoided by good manufacturing practice," and Petitioner complains of the Court's interpretation of this provision. The requirement in production and in good manufacturing practice and the economic necessity of coloring will be developed in subsequent paragraphs. At this time, however, we want specifically to call to the attention of this Honorable Court the fact that the opinion of the Court of Appeals of the Fifth Circuit (Petitioner's Appendix, pp 47 and 48) very carefully provides that "nothing herein or in the judgment of this Court entered pursuant thereto shall restore said coal-tar color to the list of colors which may be certified for unrestricted use" and then provides that it be for the purpose of coloring the skins of mature oranges and the certificate may be limited for use in coloring oranges only and "provided further, that nothing herein or in the judgment of this Court entered pursuant hereto shall be deemed to restrict the Secretary from making further investigations and conducting hearings for a determination of whether the use of Red 32 is required in the production of oranges and to determine the tolerances, if any, that are safe and harmless, as harmless is herein construed and defined." So, the Secretary still has his broad general powers in determining and making his findings under 406(a). He does, however, have a more flexible definition of the word "harmless" and the word is not construed in an absolute manner.

With reference to the position of the Petitioner in the last paragraph on page 13 of the Petition we again respectfully submit that the decision is not erroneous and is in conformity with the previous decisions of this Court. It does not defeat the object of Congress in passing Public Law 672. The report of both the House and the Senate Committees show that prior to the passage of the bill Industry had already begun its studies and both used the words: "the committee received testimony that these studies were well under way and promised to yield good results." (H. Rep. 1982, 84th Congress, 2d Sess, p-3; S. Rep. 2391, 84th Congress, 2d Sess, p-3). This research has been continued with good results. This matter will be developed further in the argument.

Yellow colors, used principally in margarine, are referred to on the same page of the petition. This decision has nothing to do with any yellow color. No yellow colors are involved in either the Second Circuit case or the Fifth Circuit case, the colors delisted being F.D.&C. Orange No. 1, Orange No. 2 and Red No. 32. (See Opinion, page 28 of Petitioner's Appendix) The Fifth Circuit carefully restricts its decision to F.D.&C. Red No. 32 as used in the coloring of mature oranges. The evidence shows that Red 32 was used and sold only for coloring oranges and the Fifth Circuit order so limited it. (Joint App. 47). We do not believe even any dicta affect yellow colors but even if there were any dicta in the case it is well recognized that the Supreme Court of the United States will not grant review by certiorari to correct dictum. We submit that this decision is not erroneous, that it a well worded and considered opinion, and a careful reading of the opinion shows that the Court of Appeals of the Fifth Circuit had a good grasp of the law, and the facts as it applied to oranges.

The reasoning and result of the decision of the Fifth Circuit neither conflict with the decision of the Second Circuit. Both courts pointed out the difference between the two cases, and the decision does not defeat the object of Congress in passing Public Law 672, 84th Congress, 2d session. The decision is in accord with the previous holdings of the Supreme Court of the United States and is good law. (United States vs. Lexington Mill and Elevator Co., 232 U. S. 399, 34 S. Ct. 337, 58 L. Ed 658)

I

THERE IS NO BASIC CONFLICT BETWEEN THE DECISIONS OF THE SECOND CIRCUIT AND OF THE FIFTH CIRCUIT AND NO NEED FOR RESOLUTION OF ANY CONFLICT

A. The Second Circuit (The Certified Color Industry Committee et al v. Secretary of Health, Education and Welfare, Marion B. Folsom, Respondent, 236 F 2d 866) pointed out the difference between the two cases and among other things at page 871 said:

> "Thus the problem is far different from the one presented recently to Congress when the act was amended to permit the use of Red 32 on orange skins not intended for processing. With only one product contaminated it was not too difficult to argue that such small amounts were involved that a man would have to drink 5000 gallons of orange juice a day before experiencing any adverse effects." 236 F 2d 871.

The Court also in that case pointed out there was nothing in the record to indicate how much of the coal-tar colors a human being would ingest nor did the petitioner in that case introduce any evidence as to this. In the Fifth Circuit case, sought to be reviewed here, the record definitely showed the quan-

tities and that it was not harmful in the manner and quantity used. The Second Circuit case dealt with all three colors. The Fifth Circuit case dealt only with one color and its limited use in the coloring of oranges and there is a showing of economic necessity and the use of this color prior to the passage of the Federal Food, Drug and Cosmetic Act. The Fifth Circuit also pointed out the difference between the two cases with these words in its opinion:

> "We are here reviewing the order of the Secretary only with respect to the coal-tar color F.D.&C. Red 32 as used in the coloring of the skins of oranges . . . We are not confronted with the broad questions which were before the Second Circuit in the Certified Color Industry case, supra." (Pet. App. 38)

Both cases followed the Supreme Court of the United States v. Lexington Mill and Elevator Company and both used this quotation therefrom:

> "If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under this Act. (232 U. S. 399; 34 S. Ct. 337; 58 L. Ed. 658)

The Second Circuit held that the word "harmless" was not used in an absolute sense. The Second Circuit also stated:

> "However, we do agree that the word 'harmless' as used in 406 (B) has some relation back to 402 (A)."

The Second Circuit used the words "even assuming maximum tolerances could be established." The Fifth Circuit used these words:

> "and provided further, that nothing herein or in the judgment of this Court entered pursuant

> hereto shall be deemed to restrict the Secretary from making further investigations and conducting hearings for a determination of whether the use of Red 32 is required in the production of oranges and to determine the tolerances, if any, that are safe and harmless, as harmless is herein construed and defined."

Thus it will be seen that the Courts themselves in the two Circuits distinguished the issues and there is no such conflict as to be reviewed by certiorari. The Fifth Circuit also pointed out the difference in the cases:

> "The identical issue is not presented and a different principle is involved. In the Second Circuit case three coal-tar colors were involved and the uses were all inclusive" (page 34- Pet. app.)
>
> "The problem we consider is not that which the Second Circuit had and the decision there is, as we hope to show, not in conflict with what we decide here" (Page 35 Pet. App.)

The Fifth Circuit agrees with considerable of the reasoning of the Second Circuit and limited the decision to F.D.&C. Red 32 as used in the coloring of oranges but leaves the matter wide open for the Secretary to determine in what amount the color can be used with safety and so as not to endanger health and to determine the other required elements before fixing such tolerances. The use for the coloring of oranges was recognized by the Congress.

The Petitioner takes the position that the Fifth Circuit casts the burden on the Secretary to show that the color is not safe for oranges. He overlooks the fact that the order clearly allows the Secretary to determine the amount of tolerances. The color was recognized by Congress in the passage of the 1938 Act and Section 402(c) of the Federal Food, Drug and

Cosmetic Act specifically protected the coal-tar color in common use where application had been made for listing and such application had not been acted upon. The color was subsequently in 1939 certified. The practice of coloring is an economic necessity and so recognized by the Congress.

> "This practice has become an economic necessity for a major segment of the orange industry, since large quantities of oranges grown in Florida and Texas would meet with strong consumer resistance if they are not artificially colored."
>
> Sen. Re. 2391, 84th Congress
> 2d Session, Pages 1, 2 and 3

The hearing and various actions taken are controlled by Section 701 (52 Stat 104 - 21 U. S. 301 et sequor) (Section 371 of 21 U. S. C. A.) which provides in part:

> "(e) . . . The Secretary shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based . . ."
>
> "(f) . . . The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive."

They are also controlled by Section 7 of the Administrative Procedure Act (5 U. S. C. A. 1006), which provides in part:

> "In hearings which Section 1003 or 1004 requires to be conducted pursuant to this section . . ."
> ". . .
>
> "(c) . . .Except as statutes otherwise provide the proponent of a rule or order shall have the burden of proof . . ."

The following statements show the views of the Department:

"There is, however, no evidence that in the amounts used and in the manner of use, in the coloring of citrus fruit, the product so colored is not safe for human consumption."

Statement of Honorable George P. Larrick, Commissioner of Food and Drugs, Department of Health, Education and Welfare. (R-38)

Excerpts from his statement made on hearings on H. R. 7732 are as follows:

"As we interpret the law, the certification of coal-tar colors for use in food does not permit fixing a tolerance for harmful colors for use in or on particular foods; but it provides that if coal-tar colors are not harmless they shall not be listed and certified at all.

"The tests of the toxicity of this color which have been made in the laboratories of the Food and Drug Administration were not designed to learn the effect of this color upon human beings when consumed by reason of its use on the skin of oranges and in the minute quantities that may thereby be ingested, but, rather, the tests were made to determine whether the color is harmless for use in foods generally.

". . . .

"While the scientific evidence so far available does not establish what the lowest safe dosage would be to test animals, neither does it establish a likelihood of injury to man from the use of this color on the exterior of oranges at the levels of use involved. This color has been in use for the coloring of oranges since the early 1930's. We have not found evidence, so far at least, that injury to consumers has resulted from the consumption of oranges so colored.

"Considering all of the information so far available - and bearing in mind particularly the min-

ute amount of this dye likely to enter the human diet as a result of its use on oranges - we cannot say that its continued use on oranges, not intended for processing, would pose a hazard to the public health.

". . . when as here there is no present evidence of injury to man from this partciular use of the dye."

Hearings before a subcommittee of the Committee or Interstate and Foreign Commerce, House of Representatives, 84th Congress, Pages 17 and 18.

The official report of the Secretary appearing on pages 2 and 3 of the same hearings are to the same effect, wherein the Secretary states:

". . . neither does it establish a likelihood of injury to man from the use of this color on the exterior of oranges at the levels of use involved."

The color having been certified for approximately 20 years and having been certified as harmless and suitable for use in food, when at the time of certification it was known that coal-tar colors would cause injury when fed at high levels, but there being no showing of any likelihood of injury in the manner and quantity used in coloring oranges, certainly under these conditions there should be substantial evidence before taking the color off the certified list.

B. We respectfully submit there is no such conflict between the two circuits as to require the need for resolution of differences. Petitioner asserts that on account of the decision there is now no reason for the industry to institute studies or to take action and, on the other hand, the scientific evidence to support the course of action required of the Secretary by the Court below does not now exist. We respectfully call the attention of the Court to the Senate Report on H. R.

7732, which became Public Law 672, 84th Congress, 2d Session, wherein the report states the committee received testimony that "these studies are well under way and promise to yield good results." (S. Rep. 2391, 84th Congress, 2d Sess, p-3)

The Department is well aware of considerable research having been done and we understand in view of the factual nature of the statements made in the Petition that the Petitioner has no objection to our answering with a short factual statement. The Industry has expended more than $127,000.00 in research on new colors since the Secretary's order and has developed a new color with ten times the safety factor of F.D.&C. Red 32 and application is being prepared for the certification of this color. However, if the Secretary continues the position that he must construe the word "harmless" in an absolute sense as he as heretofore, then no coal-tar color can be certified. Since the Secretary's decision was made there has been completed a study by the Department of National Health and Welfare of Canada which confirms a level of no-effect in F.D.&C. Red 32. A pertinent portion of the report reading as follows:

> "F.D.&C. Orange No. 2, F.D.&C. Red No. 32, and F.D.&C. Green No. 2 in concentrations of 0.03% in the diet did not affect growth, food consumption, or food efficiency in either male or female rats."
>
> CHRONIC TOXICITY STUDIES ON FOOD COLORS By M. G. Allmark, H. C. Grice, and W. A. Mannell. Food & Drug Laboratories, Dept. of National Health and Welfare, Canada. Journal of Pharmacy & Pharmacology Vol. 8; pages 417-425, June 1956.

This is far in excess of the four parts per million used on the peel in coloring oranges. There is no showing of any likelihood of danger to the public health.

The Petition again refers to the yellow colors. As pointed out frequently in this brief, the Fifth Circuit decision was limited to F.D.&C Red No. 32. If yellow colors previously certified have been or should be taken off the list the facts in these particular proceeding will be subject to review by the aggrieved parties under the provisions of the Act and such proceedings should have been taken within 90 days, and the Fifth Circuit decision does not affect them.

C. We do not feel that it is necessary for the Court to decide whether the question is moot or not because Petitioner has not made sufficient showing to warrant review.

The 90 days for the review of the decision was a review taken by persons adversely affected, namely, the respondents in this case, and we do not feel that the case of Reed vs. Ewing (205 F 2d 630) cited on page 18 of the Petition is applicable to this particular case.

II

THE DECISION OF THE FIFTH CIRCUIT IS NOT DEMONSTRABLY INCORRECT BUT IS CORRECT AND IS IN ACCORDANCE WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, THE INTENT OF CONGRESS, AS SHOWN BY THE LEGISLATIVE HISTORY, THE PREVIOUS ADMINISTRATIVE DETERMINATIONS AND RECOGNIZED RULES FOR CONSTRUCTION OF STATUTES

A. The rulings of the Court below are not incorrect. On the contrary, the decision of the Court below is in accordance with the decisions of the United States Supreme Court, the intent of Congress and the previous administration determinations and the recognized rules for construction of statutes. Both circuits

quote from the case of U. S. v. Lexington Mill and Elevator Co. This case went up from the Western District of Missouri to the Eighth Circuit. The Court of Appeals for the Eighth Circuit reversed the District Court and held that the construction of the trial judge was strained and, among other things, said:

> "The trial Judge decided that if the added substance was qualitatively poisonous, although in fact added in such minute quantity as to be non-injurious to health, it still fell under the ban of the statute . . . There is no warrant in the statute for such strained construction. The object of the law was evidently:
>
> (1) To assure to the purchaser that the article was what it purported to be and
>
> (2) To safeguard the public health by prohibiting the inclusion of any foreign ingredients deleterious to health.
>
> (Citing Hall-Baker Grain Company vs. U. S. 198 Fed. 614.)
>
> Lexington Mill and Elevator Co. vs. United States, 202 Fed. 615

Page 621 of the opinion is very enlightening and it shows the fact that poisons in some greater amounts are frequently present in potable water, bacon, ham, fruits, and certain vegetables, etc. It also refers to "the deleterious effect intended to be prevented by the act." This case went to the Supreme Court of the United States and in the opinion the Court upheld the decision of the Circuit Court of Appeals, and among other things, said:

> "It is evident from the charge given and request refused that the trial Court regarded the addition to the flour of any poisonous ingredient as an offense within this statute, no matter how small the quantity and whether the flour might or might not injure the health of the consumer.

> At least such is the purpose of the part of the charge above given and if not correct it was clearly misleading, notwithstanding other parts of the charge seemed to recognize that in order to prove adulteration it is necessary to show the flour would be injurious to health . . . If it cannot by any possibility where the facts are reasonable considered injurious to the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredient may not be condemned under the act. . ."

At other places in the opinion the Court used the following wording in quoting the Chairman handling the legislation:

> "As to the term 'poisonous,' let me state that everything that contains poison is not poisonous. It depends upon the quantity and the combination. A very large majority of the things consumed by the human family contain, under analysis, some kind of poison, but it depends upon the combination, the chemical relation which it bears to the body in which it exists as to whether or not it is dangerous to take into the human system."
>
> Lexington Mill and Elevator Co., 232 U. S. 399, 58 Law Ed. 658 Page 412 of the Opinion.

While the Wood case was under the old Act, yet it points out certain observations that are pertinent here.

> 'The evidence in the case does not present a disputed issue of fact, but rather a difference between chemists over the meaning of the words "deleterious ingredient, injurious to health.' In recognizing that a small quantity of arsenic is not injurious to health the government acknowledges that this term is a relative one . . . The Congress has not assumed to define with absolute particularity what is or what is not injurious,

and we cannot accept the testimony of the one witness who testified for the government to the effect that the word 'injurious' is an absolute term. . ."

W. B. Wood Manufacturing Company vs. United States, 286 Federal Reporter —Page 86 of the Opinion.

Just as the government wanted the word "poisonous" and the word "injurious" in the Lexington Elevator case to be construed in an absolute rather than a relative sense and in the Wood case wanted to have the word "injurious" so construed, so in this case does the Petitioner seek to have the words "harmless" and "harmful" construed in an absolute sense. The Court of Appeals of the Fifth Circuit followed the example of the U. S. Supreme Court in the Lexington Elevator case, supra, and did not agree with the Secretary as to his construction of the word "harmless." Neither did the Second Circuit agree with his construction of the word "harmless" The Lexington Elevator case was good law then and is still good law today. The use of the word "harmful" or the word "harmless" did not change the criteria.

The word "injure" means to harm (Websters New Twentieth Century Dictionary, 2d E. page 944); to do harm to (Ballantine Law Dictionary, page 650)

The Petitioner states the question of tolerances becomes much different if more than one product is involved. Tolerances far in excess of the amount used on the skin of oranges in coloring are allowed today for residue on apples, pears, cherries and other fruits and vegetables where the peeling is eaten. The Fifth Circuit in its opinion appearing on page 46 of the Petitioners Appendix very sensibly points out:

"The inability to control the quantity used is no different, as we see it, in dealing with the coal-

> tar color than with respect to other toxic or poisonous substances where the Secretary is required to establish tolerances."

Petitioner again refers to margarine and we again respectfully call the attention of the Court to the fact that this color is not used for coloring margarine and the decision of the Fifth Circuit did not deal with the problems relating to margarine.

On page 19 of the Petition Petitioner refers to statements made by Dr. Calvery and Walter G. Campbell. Both of these recognized that the word "harmless" was to be construed in a relative manner and that tolerances were intended to be granted. At the time of the passage of the Act the Honorable Walter G. Campbell, the then Chief of the Food and Drug Administration of the United States Department of Agriculture, testified:

> "There are very few things, as an illustration, in which you will not find contaminating products in some small degree. With our industrial development, it is extremely difficult to acquire absolute purity in the production of our food supply. . .
>
> "Now, under the terms of the present law and under the terms of this measure as I have read it so far, action would be authorized in such cases only when the amount of that added deleterious ingredient was sufficient to injure health. There is a complete exclusion of added deleterious ingredients by this section, except where necessary in the production of the product or where unavoidable. In those instances the poison will be permitted or tolerated in amounts corresponding to the need of using the poison, or its unavoidability, in each particular food. The total of the amount so allocated will not be enough to jeopardize health."

Food and Drug Act - S. 5

Hearings, Committee on Insterstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, pp. 59-60, Dunn Food, Drug and Cosmetics Act, p. 1251

He also had testimony on one version of the Senate bill as follows:

"In Section 10 . . . you will find, in the second paragraph of that section . . . that the Secretary is authorized to make regulations, after notice and hearing, for the certification of coal-tar colors which he finds to be harmless for use in food.

"The Chairman: That is not in the law now?

"Mr. Campbell: That is not in the law now.

"The Chairman: It is there by regulation.

"Mr. Campbell: By regulation we have actually done that. After the existing law became effective the then Bureau of Chemistry, in recognition of the impurities to be extensively found in a great many coal-tar colors and the poisonous character of some of the colors themselves, issued regulations designed to assure the manufacturers and other purchasers that the colors used by them would be non-toxic and free from deleterious ingredients. These regulations established the practice of examining and certifying the purity and safety of coal-tar colors as a method for the protection of the public.

"It is desirable that it be continued. In this language we are asking for legislative confirmation of a practice which has existed since 1907."

Hearings before a Subcommittee of the Committee on Commerce, United States Senate, 73 Cong. 2d Sess. on S. 1944 Dec. 7, 1933 (U. S. Government Printing Office, 1934) pp. 28-29

He also in the Senate hearings made the following statement:

> "We find that authority is delegated after appropriate investigation which will result in the determination of pertinent facts to establish by regulation tolerances in food products by added poisons and deleterious ingredients; certificate of coal-tar dyes for food, drugs and cosmetics."
>
> Hearings before subcommittee of the Committee of Commerce, U. S. Senate, 74th Congress, 1st Sess., pp. 358 and 359

On page 96 of the House hearings he referred to the authorization for the establishment of tolerances.

Senator Copeland, a medical doctor who was at that time Chairman of the Senate Committee handling the legislation in the hearings just previously referred to made this statement:

> "So, the Department itself would have to determine whether there was too much of this or that poison in the cosmetic, if there is any there."

The Senate and the House Reports show the recognition of the certification of coal-tar colors and states that legislative sanction is given to the administrative practice of the Department. The final report prior to the conference states:

> "Subsection (b) of this section specifically authorizes the listing of harmless coal-tar colors for use in food and the certification of batches of the listed colors which are found to be sufficiently free from impurities to be safe. This continues in effect a system of certification which has been followed almost from the beginning of the enforcement of the old food and drug law in order to make available to the food manufacturing industries adequate supplies of colors of established safety and purity."

House Rep. No. 2139 (75th Cong., 3d Sess.) 1938

Sen. Rep. No. 361, 74th Cong., 1st Sess. (1935)

This view and construction is borne out by the testimony of Dr. Calvery, then Chief of the Division of Pharmacology, in his testimony on certification of coal-tar colors shortly after the passage of the Food, Drug and Cosmetic Act. (page 233 of the hearings when F.D.&C. Red was certified in 1939)

"Q. 'Are there in your opinion any coal-tar colors that are harmless and suitable for use in all kinds and classes of Foods, Drugs and Cosmetics.'

"A. (Dr. Calvery), 'No, in my opinion there are no coal-tar colors that are harmless and suitable for use in all kinds and classes of Foods, Drugs and Cosmetics'. . ."

Later in the hearings he made the further statement: (page 243 of the hearings)

"Q. 'What do you mean by the terms that you have used, 'harmless and suitable for use'? The use to which the color is to be subjected?'

"A. 'Yes, by harmless and suitable for use for the purposes indicated, we mean that in the concentrations that these substances are used for coloring purposes, it is our opinion that no harm can come from them to the user when used in the concentrations for which they are designed'. . .

"Q. In considering the amount used, does the tinctorial property of these coal-tar colors have some bearing on the amount used?

"A. "Yes, the tinctorial properties of the coal-tar colors is such that when they are used

in foods, drugs and cosmetics they are used in relatively small percentages, and one takes that into consideration when one speaks of the toxicity of these substances assumed as harmless and suitable for use in drugs and cosmetics.". . . .

"Q. "Dr. Calvery, how do you arrive at percentage of color which should be allowed as harmless and suitable for use in foods, drugs and cosmetics?"

"A. "We arrived at the conclusion that we have concerning the use of these from our conferences with the cosmetics, food and drugs manufacturers, and after learning from them what the percentages are which in most cases are a fraction of a per cent, we based our reasoning on that premise. The colors are not certified for use as colors to be consumed as colors. They are certified—at least we are permitting the listing of these for certification—on the basis of the fact that they will be used as we have been told they are being used at the present time, that is, in small percentages." . . .

Hearings U.S.D.A. F.D.&C. Docket No. 4. Feb. 7, 1939, pp. 233 and 243;

Hearings U.S.D.A. Docket F.D.&C. 9, July 1939, Page 63

When we compare this with the testimony of Dr. Vos, Assistant Chief of the Division of Pharmacology of the Food and Drug Administration, the main witness on whose testimony the colors were decertified we will see that there were no new facts brought into the matter and that at the time of certification it is shown that "harmless" was construed by the Department taking into consideration the quantity and manner of use. This is pertinent on the construction of the word "harmless" as well as the right to fix tolerances. The

limitation as to quantity was important. This is only another way of saying tolerances.

Excerpts from Dr. Vos' testimony are as follows:

"Were you using the term 'harmless' then in the absolute sense that each of the colors were capable of producing harm? A. That is correct.

"Q. In that sense, then, is not common salt capable of producing harm? A. Well, I believe in the case of common salt you have to take into consideration the fact that it is essential to live, so that since you can't get along without some salt, I don't think you could ordinarily consider salt harmful.

"Q. Nevertheless, if you took salt in a quantity of two or three ounces, you may get some bad results from salt? A. There would be some adverse effects from two or three ounces of salt, yes. (App. 27-28)

". . .

"Q. Dr. Vos, aren't the amount and method of proposed use of a material necessary data for deciding whether the material is harmless for the use intended?

"The Witness: I would say, yes" (R. 120, App. 32)

". . .

"The Witness: Yes, The amount of the dye, of the color, has to be considered in determining whether or not it is harmless." (R. 120, App. 32)

Again, Dr. Vos, Respondent's expert witness testified:

"Q. Well then, these levels were not specifically related to the levels of these colors as actually used under normal conditions of use? A. No, that was not a part of this.

"Q. Have you any evidence at such levels where the capacity for producing harmful effects was

tested at levels of ordinary conditions of use?

A. I have very little information on the matter of what the customary levels of use are." (App. 25, R. 172)

"Question: Dr. Vos, then you have no evidence as to the capability of producing harmful effects of any of these colors at the level of ordinary use under normal conditions of use, I should say.

Dr. Vos: Without having more thorough information on the actual level of ordinary use, I would hesitate to answer that question.

Question: Well, you have no evidence at levels other than the levels appearing in the exhibits.

Dr. Vos: That appear in the exhibits, that is correct." (R. 172, App. 26)

"Yes, the amount of dye, of the color has to be considered in determining whether or not it is harmless." (R. 120)

"THE WITNESS: I think it is appropriate the method of use should be taken into consideration. The dyes in question are at present being certified for use in foods, drugs, and cosmetics, and the data which we presented in these exhibits have shown that they are not harmless for use in all of those products. As I have pointed out, we have no data as to whether they are or are not harmless for external application." (App. 33-34)

From a technical viewpoint a distinguished food chemist sums matters up with the following statement:

"There is no foundation in toxicology for regarding all substances as either poisonous or deleterious, on the one hand, or safe or harmless, on the other. The optical physicist has his absolute white and absolute black, but there are no absolutes for the toxicologist. 'Toxicity' depends on species,

age, weight, sex, dosage, route of administration, physiological or pathological state, and manifold other factors comprising 'experimental conditions.' Translation of toxicity data into terms of real or potential effects under any given set of circumstances; as for example, the determination of hazard to any particular segment of the population or to the public health generally, involves considerations that go far beyond toxicity effects in laboratory animals."

Oser, CAN A POISON EXIST IN A VACUUM?
A Discussion of Section 406 (a), 8 Food, Drug, Cosmetic Law Journal, 693, 696, (1953).

The best scientific opinion agrees with this position; the Ad Hoc Advisory Committee of the National Academy of Sciences in its report of June '56 pointed out that the certification of a compound as "harmless and suitable for use" in food, etc, is unrealistic unless the level of use is specified, and that under the rigid interpretation of this directive many components of ordinary diet could not be certified and the Food and Drug Administration will be handicapped in setting up sound research programs designed to determine safety of coloring for human use and consumption so long as it is denied authority under the law to specify levels of use.

The Report of the Ad Hoc Advisory Committee of the National Academy of Sciences—National Research Council, Reviewing the Food and Drug Administration Research Program on Coal-tar dyes, June 1956, page 17.

While prior to the 1938 Act coal-tar colors were not mentioned or treated specifically in the Food and Drug legislation they were certified under the regu-

lations of the Food and Drug Administration as will be seen by the testimony of Dr. Campbell hereinbefore referred to and subsequently referred to in Congressional reports.

> Administrative Procedure and Practice in the Department of Agriculture under the Federal Food, Drug and Cosmetic Act of 1938, prepared under the direction of Mastin G. White, Solicitor (1940), p. 65.

Regulation No. 13 entitled COLOR AND PRESERVATIVES, used the words:

> "(a) Only harmless colors and harmless preservatives may be used in articles of food."
>
> Regulations for Enforcement of Federal Food and Drug Act. (S.R.A.F.D. No. 1 issued Nov. 1930)

Regulation 12 also contained the words:

> "Only harmless colors may be used in food products."

The methodology is described as follows:

> "The harmless nature of the color is appraised by a study of the results of (physiological) investigations. To be taken into consideration are the minimum lethel dose, as determined by the experiments, the chronic toxicity as demonstrated by damage to internal organs and growth rate, and the various dermal tests."
>
> Herrick, Food Regulation and Compliance, v. 2, p. 998 (1947)

The testimony showing that there were no known harmless coal-tar colors for all purposes and this having just been stated to the Congress, certainly it would have been futile for Congress to have said that the Secretary shall certify coal-tar colors which are harmless and suitable for use in food unless it was meant

in a relative manner. Any other interpretation would have been absurd. And to have provided as the Congress did in 402(c) to allow the continuation of coal-tar colors unless action was taken on certification and then to decertify the same color 20 years after certification would be to defeat the will of Congress. Certainly it was intended to use the word in a relative manner and to allow tolerances and/or limit certificates for the purpose of protecting the public health. Under the other regulatory portions of the Food and Drug Act the Secretary had broad powers and there was no restriction preventing this.

Petitioner claims that the Fifth Circuit has misinterpreted 406(a) in holding that "required in production" means required in production for market by a particular industry. The principal purpose of producing any agricultural commodity on a large scale is for a market. We have passed the time when a grower merely raises for his own consumption, and the words "production thereof and good manufacturing practice" embrace those things that are necessary to get the product ready to ship.

The record and scientific publications clearly show that in order to market the crop of oranges it is necessary to color. As hereinbefore set forth Congress in its report referred to it as an economic necessity. The following technical and official publications show the necessity:

> "It is well known that citrus fruits grown under certain climatic and cultural conditions may be mature and highly desirable for food while the skin of the fruit is still green in color . . . In general, when it reaches full color on the trees the fruit in this region is characterized by a low acidity, with a comparatively high sugar content, and the overripe fruit is inclined to be insipid in flavor.

It is important then, if this fruit is to be furnished to the consuming public in its most desirable condition for food, that it be harvested before it becomes yellow on the trees . . . It is evident, then, that some method of treating this fruit so that it would assume a rich orange yellow color early in the season, when it is most desirable for food, would be of benefit to the industry and to the consuming public alike."

U. S. D. A. Bulletin No. 1159
August 1923

"Some of the early fall varieties of oranges and grapefruit ripen while the fruit is still green in color . . . There is, therefore, no definite relation between flavor or maturity and the color of the fruit while on the tree. However, there is a very significant relation between the color of the fruit offered for sale and the price it will bring, and citrus fruit producers have always faced the problem of making the color of ripe fruit match its flavor."

U.S.D.A. The Year Book for 1932, pp. 134-137

"It is obvious, then, that treating fruit which is physiologically mature or has reached a stage in its development at which it has high dessert quality, so that it assumes a color or appearance pleasing to the eye and has a higher decorative value, is a legitimate practice in marketing and one which should be encouraged."

U. S. D. A. Bulletin 1367, May 1926, 167

but the decision of the Fifth Circuit still leaves the Secretary power to determine whether the coloring is required in the production of oranges and to determine the tolerances, if any, that are safe and harmless.

Reference to the use and the necessity for the use are a recital of what the Congress had said and was

previously quoted in this brief. The Court is well aware of the many decisions holding that fruit packing houses engaged in the production of goods for commerce and that the packing and wrapping and making ready for market are considered as part of the production. The factual question is left open to the Secretary for determination. So, there is no new rule of law set down nor any misinterpretation of the statutes. We feel the Petitioner has misconstrued the Court's opinion and, as we view it, a reading of the complete decision shows a well reasoned and carefully considered decision.

With reference to certifying for one particular purpose, this is merely one of the methods of limiting the use of a color. The Secretary claimed he did not have that right and the Court of the Fifth Circuit said that he did. This, I understand, will be treated more in detail in Mr. Schell's brief. However, we respectfully call attention to that portion of the Fifth Circuit's decision appearing in the last paragraph on page 43 and the first paragraph on page 44, wherein it showed the certification of a color for coloring eggs. The F.D.&C. Red 32 is an oil soluble color and does not penetrate the rag of the orange, so if a color could be certified for coloring eggs there is on reason why a proper color could not be certified for coloring oranges. The Secretary has likewise certified F.D.&C. Violet No. 1:

> "The amount of color fed the animals in the tests referred to in finding No. 12 was far in excess of the amount that any human might obtain as a result of food colored with F. D. and C. Violet No. 1."
>
> Finding of Fact No. 13, 15 Fed. Reg. 3517, (June 7, 1950)

Certification was made of a color for use by Section 135.1 (CFR) of the regulations and providing a

restricted use providing that it should not authorize the certification of any such color for use in any article which is applied to the area of the eye. There was no specific statutory authorization for this limitation but it was upheld by the Court of Appeals in the Fifth Circuit wherein it said:

> "The statute contemplates that he shall not arbitrarily exercise his power, but shall act only upon a conscientious judgment derived from a consideration of the facts and conditions to which the regulation is to be applied."
>
> Byrd vs. United States, 154 F. 2d 62 (5th Cir. 1946)

We respectfully submit that even in the order under review the Secretary took the colors off of one list and relisted them for external use in cosmetics which is not itself a restricted list. If he can list a color for applying on lips or to skin he can list a color to be used only for applying to the outside of oranges and the Fifth Circuit correctly so held. It is only an additional method of protecting the public health.

Incidentally, while the particular review provision was brought by the Florida and Texas growers and packers, the order does not limit its use in these states and allows the certification "as may be necessary to color the skin of mature oranges."

The Court of Appeals of the Fifth Circuit correctly construed the word "harmless" in a relative sense and not an absolute sense. The decision of the Fifth Circuit is in accordance with the general rules of statutory construction. This Honorable Court laid down certain general rules in the case cited below:

> "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within the spirit nor within the intention of its makers.

"This is not the substitution of the will of the Judge for that of the Legislator, for frequently words of a general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or the circumstances surrounding its enactment, or the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the Legislator intended to include the particular Act.

"It is the duty of the Courts under those circumstances to say that however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and cannot come within the statute."

Holy Trinity Church vs. United States, 145 U. S. 457, 459, 12 Supreme Court 511, 512, 36 Law Ed. 226.

The Circuit Court of Appeals in the Second Circuit in a Food and Drug case, said:

"The general language should not be so construed to ruin a legitimate business and yet remedy none of the evils the statute was designed to remove."

French Silver Dragee Co. v. United States, 179 Federal 824

The Court of Appeals in the Fifth Circuit in the opinion, appearing on page 37 of the Petition, gave the following as some of the rules in deciding the case, and for brevity instead of citing here the cases substantiating each of these rules we respectfully call the Court's attention to the citations by the Court as shown on page 37 of the Petition, wherein it appears that these rules were laid down by this Honorable Court:

"In the construction of statutes courts will look to the entire act and to its objects and policy. Results which are incongruous or absurd are to be avoided. Where a particular construction of

a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. In the construction of a legislative measure, statutes in pari materia, amendatory acts, and their legislative history may be examined."

CONCLUSION

We respectfully submit that the burden of proof is upon the Petitioner and that writs of certiorari are only granted under special circumstances and should be sparingly exercised and only in cases of peculiar gravity and general importance and we respectfully submit there has been no such showing as to warrant the highest court in the land in reviewing the decision of the Fifth Circuit. The decision of the Fifth Circuit is limited in its nature and the decisions of the Fifth and the Second Circuits can be reconciled, the Fifth Circuit decision being based upon the particular facts before it. Both Courts followed the decision of this Honorable Court in interpreting the word "harmless." The other matters in the decision are incidental and methods of insuring that it is harmless as used. Under the facts before the Fifth Circuit a construction other than the one which has been placed would not have been in accordance with the previous decision of this Court.

We submit that there has been no such showing as to warrant the issuance of the writ of certiorari and respectfully urge the denial of this Petition.

Respectfully submitted,

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